

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:NER:MAN:TL-N-1168-00

DARosen

date:

to: Chief, Examination Division, Manhattan
Attn: Revenue Agent Ronald Chabot

from: District Counsel, Manhattan (CC:NER:MAN)

subject:

Taxable Years Ended [REDACTED] and [REDACTED]
(Forms 1120)
Consents to Extend the Statute of Limitations on Assessment
STATUTE OF LIMITATIONS EXPIRES: [REDACTED]
[REDACTED]

UIL Nos. 1502.77-01, 6501.08-17

DISCLOSURE STATEMENT

THIS DOCUMENT INCLUDES CONFIDENTIAL INFORMATION SUBJECT TO THE ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES, AND MAY ALSO HAVE BEEN PREPARED IN ANTICIPATION OF LITIGATION. THIS DOCUMENT SHOULD NOT BE DISCLOSED TO ANYONE OUTSIDE THE INTERNAL REVENUE SERVICE, AND ITS USE WITHIN THE INTERNAL REVENUE SERVICE SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW THE DOCUMENT IN RELATION TO THE SUBJECT MATTER OF THE CASE DISCUSSED HEREIN. ONLY OFFICE PERSONNEL WORKING THE SPECIFIC CASE OR SUBJECT MATTER MAY USE THIS DOCUMENT. THIS DOCUMENT IS ALSO TAX INFORMATION OF THE INSTANT TAXPAYER WHICH IS SUBJECT TO I.R.C. § 6103. THIS DOCUMENT SHOULD NOT BE DISCLOSED TO THE TAXPAYER OR ITS REPRESENTATIVE(S) UNDER ANY CIRCUMSTANCES.

THIS ADVICE IS RENDERED ON THE BASIS THAT ALL REPRESENTATIONS AND FACTS IN THIS MEMORANDUM ARE CORRECT. WE RECOMMEND THAT YOU VERIFY THIS INFORMATION. IF ANY OF THE REPRESENTATIONS AND/OR FACTS ARE INCORRECT OR CANNOT BE SUBSTANTIATED, OUR ADVICE MAY NEED TO BE MODIFIED.

INTRODUCTION

We have been asked for assistance in determining the appropriate language to be used on the Form 872 consent to extend the statute of limitations on assessment and collection for [REDACTED] for the taxable years ended [REDACTED] and [REDACTED]. Our advice relies upon your representations concerning the nature of the acquisition of [REDACTED] by [REDACTED] and subsequent name changes, as well as copies of certain corporate documents referenced herein.

FACTS

The Manhattan District is currently conducting an examination of [REDACTED] for the taxable years ended [REDACTED] and [REDACTED]. A consent to extend the statute of limitations on assessment for [REDACTED] for income tax for each of the taxable years ended [REDACTED] and [REDACTED] is currently being sought by the Revenue Agent.

Merger of [REDACTED] and [REDACTED]

Pursuant to an Agreement and Plan of Merger ("Merger") dated [REDACTED] [REDACTED], a Delaware corporation, merged with and into [REDACTED], a Delaware corporation, under the provisions of Del. Code Ann. tit. 8, § 251. The surviving corporation in the merger is [REDACTED], whose name was changed as of the effective date of the merger to [REDACTED].

[REDACTED] Name Change

On [REDACTED] by amendment to its Certificate of Incorporation, [REDACTED] changed its name to [REDACTED].

ISSUE

What specific language should be used on the consent to extend the statute of limitations on assessment for [REDACTED] for each of the taxable years ended [REDACTED] and [REDACTED]?

DISCUSSION

Introduction: I.R.C. § 6501

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). I.R.C. § 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. For corporate income taxes, the form used by the Service to extend the limitations period on assessment is Form 872.

Delaware Corporation Law

When a merger becomes effective under Delaware law, "[A]ll debts, liabilities, and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it." Del. Code Ann. tit. 8, § 259(a) (1999).

The Consolidated Return Regulations

Since [REDACTED] filed its returns for the taxable years in issue as common parent of a consolidated group, reference to the consolidated return regulations (Treas. Reg. § 1.1502-1 et seq.) is necessary.¹

Pursuant to the provisions of Treas. Reg. § 1.1502-77T(a)(3), "A waiver of the statute of limitations with respect to the group given by any one or more corporations referred to in paragraph (a)(4) of this section is deemed to be given by the agent of the group. Under Treas. Reg. § 1.1502-77T(a)(4)(i), the corporation referred to in (a)(3) is "[a] successor to the former common parent in a transaction to which section 381(a) applies."

Thus, the inquiry is whether the merger of [REDACTED] and [REDACTED] falls within the provisions of I.R.C. § 381(a). This

¹ I.R.C. § 1502 (requiring the Service to prescribe regulations concerning the tax liability of any affiliated group of corporations making a consolidated return).

section applies, in relevant part, to a transfer in which I.R.C. § 361 applies,² but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G)" of I.R.C. § 368(a)(1). See I.R.C. § 381(a)(2).

Since the merger in question was pursuant to Del. Code Ann. tit. 8, § 259(a) (1999), it is a "statutory merger or consolidation" as defined in I.R.C. § 368(a)(1)(A). See Treas. Reg. § 1.368-2(b)(1) (noting in relevant part that a Type A reorganization is a merger or consolidation effected under the laws of a state). Accordingly, Treas. Reg. § 1.1502-77T(a)(3) is applicable to the merger in question, with [REDACTED] a permissible agent of the consolidated group, as successor to the former common parent [REDACTED].

Language for Form 872 Caption

As set forth above, [REDACTED] survived its merger with [REDACTED], first changing its name to the corporation merged out of existence, [REDACTED], and subsequently changing its name to [REDACTED]. The caption on the Form 872 should be as follows:

" [REDACTED] (E.I.N. [REDACTED]),
formerly known as [REDACTED]
[REDACTED] (E.I.N. [REDACTED])³, formerly known as
[REDACTED] (E.I.N. [REDACTED]), as successor-in-
interest to [REDACTED]
(E.I.N. [REDACTED]) *"

In addition, add the following language to the bottom of each Form 872:

² We have not been asked to opine on whether the merger in question qualifies as a tax-free reorganization under I.R.C. § 361(a). This advice assumes that the reorganization in question was tax-free.

³ This E.I.N. was gleaned from the Form 1120 for the taxable year ended [REDACTED] filed on [REDACTED] prior to the date of the name change to [REDACTED]. We recommend that you confirm the accuracy of this E.I.N., and ensure that all E.I.N.'s omitted above are properly reflected on the Forms 872.

"*This is with respect to the income tax liabilities of the common parent corporation [REDACTED] (E.I.N. [REDACTED]) and subsidiary corporations for the taxable year _____."

Please note that Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form 872. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case file(s).

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit a Form 872, and IRM 4541.1(8) requires use of Letter 929(DO) to return a signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file(s) as directed. When the signed Forms 872 are received from the taxpayer the responsible manager should promptly sign and date them in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the respective statutes of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

If you have any questions, please contact the attorney assigned to this matter, Daniel A. Rosen, at (212) 264-5473, extension 262.

LINDA R. DETTERY
District Counsel

By: _____
PETER J. LABELLE
Assistant District Counsel

Noted:

LINDA R. DETTERY
District Counsel

cc: Michael P. Corrado
Assistant Regional Counsel (TL) (by e-mail)

Paulette Segal
Acting Assistant Regional Counsel (LC) (by e-mail)

Mary Helen Weber
Assistant Regional Counsel (LC) (by e-mail)

Theodore R. Leighton
Assistant District Counsel (by e-mail)